

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 11-CV-01430-PAB-MEH

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH SCOTT and
JO ANN SCOTT,

Defendants.

**UNITED STATES' OPPOSITION TO DEFENDANT
JO ANN SCOTT'S MOTION TO DISMISS**

The United States of America (the "United States") hereby opposes Defendant Jo Ann Scott's ("Defendant's") Motion to Dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) ("J.Scott Mot.").

The United States brought this action pursuant to the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (1994), because Defendant Jo Ann Scott used force to injure, intimidate or interfere with a patient and an individual escorting a patient seeking reproductive health services from the Planned Parenthood of the Rocky Mountains ("PPRM"). Specifically, on June 9, 2010 Defendant pushed a man in the chest and poked him in the back because he had been accompanying a patient into PPRM. On April 2, 2010, Defendant pressed her hand against a patient's arm in an effort to stop her from entering PPRM. Each of these allegations has been adequately pled, and each of these violations constitutes the use of force to

injure, intimidate, or interfere with people seeking reproductive health services. Application of FACE to Defendant's actions is consistent with both the letter and intent of the statute.

Defendant's Motion to Dismiss should therefore be denied.

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) allows dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), a court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff."

Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1215 (10th Cir. 2007) (quotation and citation omitted).

Federal Rule of Civil Procedure 8(a) provides that a complaint must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); see also, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007) (a complaint must set forth "only enough facts to state a claim to relief that is plausible on its face."); Ashcroft v. Iqbal, --- U.S. ----, 129 S.Ct. 1937, 1949 (2009) ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully.")

II. ARGUMENT

The United States has sufficiently stated a claim that Defendant violated FACE when she used force against a patient and a companion to a patient seeking reproductive health services.

Section 248(a)(1) of FACE provides, in part:

(a) Prohibited Activities – Whoever –

by force or threat of force . . . , intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any

person because that person is or has been, or in order to intimidate such person or any other person or class of persons from, obtaining or providing reproductive health services.

Defendant argues that the United States' Complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) because the United States fails to state a claim under FACE. Further, Defendant maintains that, if FACE does cover the alleged actions, FACE is unconstitutionally overbroad as applied. For the following reasons, Defendant's Motion should be denied.

A. The United States' Complaint Sufficiently Alleges that on June 9, 2010, Defendant Used Force Against an Individual Obtaining or Providing Reproductive Health Services

On June 9, 2010, Defendant pushed and poked an individual accompanying another person who was at PPRM to obtain reproductive health services. Compl. at ¶¶ 77, 79. She did so as she was yelling anti-abortion statements. Compl. at ¶ 78. Defendant does not dispute that these actions constitute uses of force. She does not dispute that these uses of force intentionally injured, intimidated or interfered with the individual. Nor does she dispute that her actions were motivated by the individual's role in accompanying a patient to PPRM. Rather, Defendant's sole contention related to this incident is that the United States fails to establish that Defendant used force against an individual "because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." J.Scott Mot. 8 (quoting 18 U.S.C. § 248(a)(1)).

However, the Complaint specifically states that Defendant's uses of force were "against an individual accompanying another person who was at the PPRM facility to seek reproductive health services." Compl. ¶ 77. It is well settled that people who are escorting patients are protected under FACE. See, e.g., New York ex rel. Spitzer v. Cain, 418 F. Supp. 2d 457 (granting a preliminary injunction where defendants pushed and threatened escorts); United

States v. Scott, 975 F. Supp. 428, 433 (D. Conn. 1997) (“FACE protects escorts who are assisting patients and staff in obtaining access to clinics.”). Significantly, the Scott case did not find FACE protection limited to “*clinic-employed* escorts,” as Defendant incorrectly asserts in her brief. J.Scott Mot. 9. Rather, the opinion, citing the legislative history of FACE, speaks generally of those “assisting patients and staff in obtaining access to clinics.” 975 F. Supp. at 433. The victim in the June 9 incident was doing just that—assisting a patient in obtaining access to the PPRM clinic.

Defendant also attempts to claim that FACE is inapplicable to this incident because, at the time of Defendant’s uses of force, the individual was not actively engaged in the act of assisting the patient. J. Scott Mot. 8. Even assuming *arguendo* that the individual’s assistance had concluded when Defendant pushed and poked him, this is irrelevant, for FACE protects both those who are obtaining reproductive health services and those who have been obtaining such services. 18 U.S.C. § 248(a)(1) (“because that person *is or has been* . . . obtaining or providing reproductive health services”) (emphasis added).

B. The United States’ Complaint Sufficiently Alleges that on April 2, 2010, Defendant Used Force in Violation of FACE

On April 2, 2010, Defendant intentionally placed her hand on a patient’s shoulder as she was attempting to enter the PPRM driveway. Compl. ¶ 75. This qualifies as a use of force that FACE prohibits. Although Defendant argues, with no support, that “under no reasonable construction” could the alleged activity be construed as force, Defendant’s own Motion cites to two cases that prove otherwise. J.Scott Mot. 4.

First, Defendant states that “the term ‘force’ as used in FACE has a restricted meaning. It means ‘physical force,’” and cites to Cheffer v. Reno as support. J.Scott Mot. 4. The United States agrees that the term force means physical force. As the court in Cheffer emphasized, in

explaining that FACE is not unconstitutionally vague, overbroad, or content- or viewpoint-based, the term “force” means “physical force,” which does not involve pure speech and is therefore outside the scope of First Amendment protection. Cheffer v. Reno, 55 F.3d. 1517, 1521 (11th Cir. 1995). Similarly, Defendant’s conduct as described in the Complaint consisted of using physical force on the patient’s shoulder and did not involve pure speech. As such, it is actionable under FACE.

Next, Defendant argues that “momentarily placing her hand on the shoulder of the patient with whom she was speaking” is not the “sort of power, violence or pressure contemplated by the statute.” J.Scott Mot. 5. For this proposition, Defendant cites to New York ex rel. Spitzer v. Cain, but somehow ignores that court’s clear interpretation of “force”, which it stated “is not limited to violent or assaultive force and there is no exception for *fleeting* and *de minimis* contact...(assuming, of course, that the fleeting use of force was intentional).” 418 F.Supp.2d 457, 473 (S.D.N.Y. 2006) (internal quotes and citations omitted) (emphasis added). Again, Defendant’s use of force against the patient is prohibited by FACE, even if her conduct did not rise to the level of a violent assault.

C. The United States’ Complaint Sufficiently Alleges that on April 2, 2010, Defendant Used Force to Intentionally Intimidate or Interfere with, or Attempt to do the Same, a Patient Because she was Seeking to Obtain Reproductive Health Services from PPRM

Defendant’s use of physical force, as described in Paragraph 75 of the Complaint, consisted of intentional physical contact made for the purpose of injuring or intimidating the patient, or of interfering with her efforts to obtain reproductive health services. The Complaint specifically states that Defendant “placed her hand on the patient’s shoulder.” Compl. ¶ 75. This use of physical force is a prohibited use of force under FACE. It would be an unreasonable construction of the statute to find that certain gradations of intentional physical force are

permissible under FACE, as Defendant appears to argue. Particularly problematic is Defendant's seeming belief that she may circumvent the statute's language by implying that the use of force was somehow even beneficial to the patient by claiming that it was motivated out of "kindness or compassion." J.Scott Mot. 4.

Defendant also claims that Defendant's conviction on state charges for the April 2 use of force is irrelevant to this FACE case. On the contrary, the conduct that a jury found violated state law was the act of Defendant placing her hand on a patient's shoulder as she attempted to enter the PPRM driveway. Compl. ¶ 76. Defendant was found, beyond a reasonable doubt, to have knowingly obstructed, detained, hindered, impeded, or blocked the patient's access to PPRM. See, C.R.S. § 18-9-122(2). Thus, Defendant's conviction for obstructing, detaining, hindering, impeding, or blocking a patient's access to PPRM is relevant to whether Defendant injured, intimidated, or interfered with a patient's access to PPRM. Moreover, Defendant's conviction for "knowingly" committing any of the prohibited acts under the state law is directly relevant to the intent and motive requirements under FACE.

Defendant's primary, if not sole, purpose in touching the patient identified in Paragraph 75 of the Complaint was to injure, intimidate, or interfere with her efforts to seek reproductive health services from PPRM. As the United States alleges in Paragraph 74 of the Complaint, Defendant followed the patient along Pontiac Street towards the PPRM driveway "telling her not to go into PPRM and telling her that if she went into PPRM, she would be 'participating in murder.'" Defendant was not engaged in "earnest conversation" with the patient regarding current events, for example, or proselytizing about Christianity generally. J.Scott Mot. 5. Her specific mission and motive for placing her hand on the patient's shoulder was to stop her from going into PPRM and "participating in murder." Compl. ¶ 74. Surely Defendant would not have

the Court believe that her activities at PPRM were and are not intended to stop people from entering PPRM. The patient here was not engaged in conversation with Defendant, nor did she desire to converse with Defendant. Indeed, the patient's failure to acknowledge Defendant's comments about murder appears to have caused Defendant to use physical force to get the patient's attention and to prevent her from entering PPRM. The fact that Defendant was ultimately unsuccessful in her attempt to restrict the patient's freedom of movement by physically touching the patient's shoulder is not dispositive. As the statute makes clear, using physical force in an "attempt" to intimidate or interfere with a person seeking to obtain reproductive health services is specifically prohibited. 18 U.S.C. § 248.

D. The Application of FACE to Defendant's Actions on April 2 and June 9, 2010 is not Constitutionally Overbroad as Applied

The Complaint alleges sufficient facts regarding Defendant's violations of FACE. Defendant argues that the "statutory interests furthered by FACE would not be furthered by proscribing the conduct set forth in paragraphs 74 to 81 of the complaint." J.Scott Mot. 10. It is not entirely clear what Defendant means by this, but in any event, prohibiting individuals who engage in anti-abortion activity at PPRM and reproductive health clinics throughout the country from using physical force of *any kind* against those persons seeking to obtain or provide reproductive health services is a fundamental component of FACE. Defendant's speech is not burdened in any way by prohibiting her from using physical force, which is not "rendered protected speech . . . merely because the actor intended to send a message, political or otherwise." United States v. Lucero, 895 F. Supp. 1421, 1425 (D. Kan. 1995) (finding no support for defendant's argument that FACE was unconstitutional as applied because he had engaged in expressive conduct).

Furthermore, to the extent Defendant claims that the injunctive relief sought by the United States is somehow overbroad, rendering the statute unconstitutional, that argument is without merit. Indeed, courts have upheld permanent buffer zones of 25 feet or greater in FACE cases in the past. See, e.g., Madsen v. Women's Health Center, 512 U.S. 753 (1994) (36-foot buffer zone around clinic entrance and driveway); United States v. McMillan, 946 F. Supp. 1254 (S.D.Miss. 1995) (25-foot buffer zone around clinic property). The U.S. Supreme Court has also recognized that these types of injunctions protect the government's "strong interest in ensuring the public safety and order," which includes "promoting the free flow of traffic on public streets and sidewalks." Madsen, 512 U.S. at 768; Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 375 (1997).

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss for Failure to State a Claim under Fed. R. Civ. P. 12(b)(6) should be denied. The United States' Complaint sufficiently alleges that Defendant Jo Ann Scott engaged in force on April 2 and June 9, 2010, to intentionally injure, intimidate, or interfere, or attempt to do the same, with persons who sought or provided reproductive health services at PPRM.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

JONATHAN SMITH
Chief
Special Litigation Section

JULIE K. ABBATE
Deputy Chief

Special Litigation Section

/s/ Je Yon Jung _____
JE YON JUNG
AARON S. FLEISHER
Trial Attorneys
U.S. Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Ave., NW
Washington, DC 20530
Telephone: (202) 305-1457
Facsimile: (202) 514-6903
E-mail: Jeyon.jung@usdoj.gov
Attorneys for Plaintiff United States

CERTIFICATE OF SERVICE

I hereby certify that the foregoing United States' Opposition to Defendant Jo Ann Scott's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) was filed electronically using the CM/ECF system, which will provide notice of such filing to all registered parties, as well as mailed by first class mail to Terry Sullivan at 1526 East 35th Avenue, Denver, Colorado 80205.

Date: ___July 28, 2011___

/s/ Je Yon Jung _____
JE YON JUNG
Senior Trial Attorney
U.S. Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 305-145
Jeyon.jung@usdoj.gov